

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
(November 19, 1997 Session)

DEBORAH ELLIS,)
)
) Plaintiff-Appellee,)
) Hon. Earl H. Henley,
) Chancellor.
)
 v.)
) No. 03S01-9705-CH-00051
)
 NATIONAL UNION INSURANC)
 COMPANY,)
)
) Defendant-Appellant)
)
 and)
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)
 SUE ANN HEAD,)
)
)
) Defendant-Appellee.)

FILED

April 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

For Appellant:

J. Bartlett Quinn
Fleissner, Cooper, Marcus & Quinn
Chattanooga, Tennessee

For Appellee, Deborah Ellis:

Thomas L. Wyatt
Summers & Wyatt
Chattanooga, Tennessee

For Appellee, Second Injury Fund:

John Knox Walkup
Attorney General & Reporter

Sandra E. Keith
Assistant Attorney General
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

John K. Byers, Senior Judge
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED and REMANDED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer's insurer and the Second Injury Fund contend the evidence preponderates against the trial court's finding that the employee's asthma is compensable; and the employer's insurer contends the condition is not permanent. As discussed below, the panel concludes the judgment should be affirmed.

At the time of the trial, the employee or claimant, Debra Ellis, was 44 years old. She has a high school education and some office and computer training, but has never done office work. She began working for National Union's insured, F. L. Industries, in 1971. Before that, she had worked for short periods of time as a cashier in a grocery store, as a sewing machine operator and in a beauty shop.

She has worked for the employer as a packer and loader of electrical connectors and outlets. She ran a machine called an autobagger in the employer's Focus department when she became disabled to work because of asthma. The claimant was in good health when she began working for the employer at the age of 19, except for some upper respiratory problems from allergies during the spring and fall of the year. Since then, she has had pneumonia three times and two back injuries. She has received prior workers' compensation awards totaling eighty-eight and one-half percent to the body as a whole, but had returned to work following those illnesses and injuries without any respiratory restrictions.

On April 11, 1990, the claimant developed facial redness and swelling at work. Her symptoms disappeared and she returned to work the next day, but her symptoms returned after she began working. When her symptoms worsened to the point where one of her eyes swelled nearly shut and she felt as if she were sunburned, she was referred by the company nurse to a doctor, who hospitalized her.

The claimant's condition improved after four days and she was released to return home. Soon she began to experience uncontrollable coughing with thick, stringy mucus until mid-May of 1990, when she was re-hospitalized after fracturing a rib during a coughing spell. Her physician, Dr. Donald Watters, who had treated her since 1984, began to suspect a link between her condition and exposure to something at work.

The claimant was regularly exposed to paint fumes at work. The paint which released the fumes was identified as Sherwin Williams Super Acrylic spray enamel. It is undisputed that she has disabling asthma, for which she takes steroid and cortisone medications, which have disabling side effects, including excessive obesity, muscle wasting, poor wound healing, immune system damage and kidney disorder.

This action originated with the filing by the employer of a complaint in the United States District Court for the Eastern District of Tennessee. Shortly thereafter, the claimant commenced an action against the employer's insurer and the Second Injury Fund in state court. The federal court case was later dismissed for lack of subject matter jurisdiction based on the Second Injury Fund being a necessary party.

When the employer offered the names of three physicians from which the claimant could choose the treating physician, she chose Dr. Spires Whittaker, who began treatment on July 10, 1990. When a dispute developed as to the choice of a treating physician, the parties agreed upon Dr. Pete Soteres as such. The record contains the deposition testimony of five medical doctors.

On November 4, 1996, the trial court found the claimant to be permanently and totally disabled from occupational asthma. Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). Causation and permanency are issues of fact.

Under the Tennessee Workers' Compensation Law, occupational

diseases arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. section 50-6-102(a)(5). For an occupational disease to be one arising out of employment, it must have its origin in a risk connected with the employment. Tenn. Code Ann. section 50-6-301. There can be no recovery for an aggravation of an alleged occupational disease which pre-existed an employee's current employment; American Ins. Co. v Ison, 519 S.W.2d 778 (Tenn. 1975); but if an employee is found to have a compensable occupational disease, the disability flowing from that disease is fully compensable, including any aggravation, acceleration or exacerbation of a pre-existing condition or disease caused by the occupational disease. Arnold v. Firestone Tire and Rubber Co., 686 S.W.2d 65 (Tenn. 1983). Disability resulting from medical treatment for a compensable injury or occupational disease is compensable. See Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

Dr. Watters, who is in the best position of all the testifying doctors to know the claimant's medical history, testified unequivocally that the claimant's asthma did not pre-exist her exposure to paint fumes at work and that such exposure was the cause of her condition. He further testified that the disease, combined with the medical treatment for it, rendered her totally disabled. Dr. Soteres, the primary treating physician, agreed as to causation and testified that the claimant's total disability was permanent. Dr. Soteres is board certified in internal and pulmonary medicine. Dr. Whittaker confirmed exposure to paint fumes as the cause of the claimant's disease and its permanency.

Dr. B. Daniel Harnsberger, a board certified internist with a pulmonary subspecialty, examined the claimant twice at the request of the employer's insurer. He found no objective evidence of residual pulmonary impairment. Dr. Michael M. Miller is board certified in internal medicine and allergy and immunology. He found, from reviewing the depositions of Drs. Soteres and Harnsberger and some medical records, no objective evidence to conclusively demonstrate the claimant has asthma.

From a consideration of the proof and the law, the panel finds the

evidence does not preponderate against the judgment of the trial court in any respect. The judgment of the trial court is consequently affirmed. Costs are taxed to the National Union Insurance Company and the Second Injury Fund, one-half each. The case is remanded to the Chancery Court for McMinn County.

Joe C. Loser, Jr., Special Judge

CONCUR:

John K. Byers, Senior Judge

William H. Inman, Senior Judge

Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Cost will be paid by the National Union Insurance Company and the Second Injury Fund, and their surety, for which execution may issue if necessary.

It is so ordered this _____ day of _____, 1998.

PER CURIAM